AS TO THE ADMISSIBILITY OF

Application No. 31106/96
by Stavros MARANGOS
against Cyprus

The European Commission of Human Rights sitting in private on 20 May 1997, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs. M. HION
MM. R. NICOLINI
A. ARABADJIEV

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 11 March 1996 by Stavros MARANGOS against Cyprus and registered on 22 April 1996 under file No. 31106/96;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 19 December 1996 and the observations in reply submitted by the applicant on 17 February 1997;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a citizen of Cyprus. He was born in 1959 and

resides in Strovolos, Cyprus. In the proceedings before the Commission he is represented by Mr. S. Drakos, an advocate practising in Nicosia.

The facts, as submitted by the parties, may be summarised as follows:

In 1974 the applicant left Cyprus for the United Kingdom. After he obtained the necessary O and A levels, he studied architecture at the University of Sheffield between 1977 and 1981. In the autumn of 1982 he enrolled for a two-year post-graduate course at the same university. However, on 24 May 1984, after the applicant had completed his first year of studies, his passport expired. On 5 June 1984 it was renewed by the Cyprus High Commission in London until 30 June 1984.

On 15 June 1984 the applicant arrived in Athens. The Consular Department of the Embassy of Cyprus refused to renew his passport referring to an "outstanding matter" he had with the Ministry of Defence.

In the autumn of 1985 the applicant was admitted, after an examination, to the Medical School of the University of Ioannina in Greece. During his studies there, he received certain benefits reserved for students with low income. The Cypriot authorities in Athens continued to refuse to renew his passport.

On 22 September 1989 the applicant applied to the Ministry of Defence for exemption from military service on the ground that he was a permanent resident abroad. On 17 February 1990 his application was refused.

On 14 August 1990 the applicant renewed his application specifying that, as a homosexual, he could not live in Cyprus given that country's criminal legislation. On 12 March 1991 he was exempted from military service as a permanent resident abroad. He was notified that, if the reasons for which he had been granted an exemption ceased to exist, he would have to present himself to the competent authorities with a view to being drafted in the army.

On 19 April 1992 the applicant asked the Ministry of Defence to inform him of the reasons for the reversal of the decision of 17 February 1990. He also asked to be informed how many months he would have to serve in the armed forces if he returned to Cyprus. On 10 September 1992 the Ministry of Defence informed the applicant that, if he returned to Cyprus, he would be liable to a nine-month period of military service in accordance with the provisions concerning the repatriation of Cypriots who lived abroad.

On 29 September 1992 and 15 December 1992 the Ministry of Defence informed the applicant that the original decision on his application for exemption had been reversed in the light supplementary confidential information concerning his father's place of residence between 1974 and 1991, which the Ministry had received from the applicant's mother and another "trustworthy independent person". The applicant was further informed that, if he settled in Cyprus permanently, he would be liable to a nine-month period of military service.

On 20 January 1993 the applicant wrote to the Minister of Defence disputing the official version and alleging that the real reason for the reversal of the original decision was the information the applicant had disclosed about his sexual preferences. The applicant sent a copy of the letter to the Attorney General.

On 15 February 1993 the Attorney General requested information from the Ministry of Defence. On 3 April 1993 the General Director of the Ministry of Defence addressed a confidential letter to the Attorney General informing him that the applicant's request for exemption had initially been refused because it had been considered that the

applicant had lived abroad exclusively in order to study and that his parents lived permanently in Cyprus. This decision was reversed after the Ministry had been informed that the applicant's father was a permanent resident abroad. The Director added that "(the applicant) has declared ... that he is a homosexual and, as you know, homosexuals in Cyprus are exempted from military service once their 'sickness' is certified by the competent conscription board or the committee which examines whether prospective conscripts are physically capable for military service (somatiki ikanotis). As a result, it is up to (the applicant) to invoke, if he so wishes, his homosexuality, if he permanently settles in Cyprus and reports for the draft within the time-limits provided by law. If he does not present himself he will be considered a deserter and will be prosecuted in accordance with the ... law."

On 17 March 1993 the applicant, who had in the meantime returned to Cyprus, informed the Ministry of Defence that he intended to remain there. On 8 June 1993 he received a call-up paper ordering him to report for duty at a military training centre on 4 July 1993. On 23 June 1993 the applicant informed the Ministry of Defence that he did not intend to comply with the order.

On 1 September 1993 the applicant was allowed to travel to Greece. On 16 November 1993 he raised the matter of his liability to military service with the Attorney General. On 22 December 1993 the Office of the Attorney General informed the applicant that the issue had been examined several times and that it had been decided that he would have to present himself to the Conscription Board with the first draft of 1994. The board would decide whether he was suitable for military service and he would have to serve unless he was exempted on grounds of health.

On 30 December 1993 the applicant received a call-up paper, which he returned on 5 January 1994. On 4 April 1994 the Military Prosecutor informed the applicant that no criminal proceedings were pending against him.

On 19 May 1994 the applicant applied to the District Welfare Office of Nicosia for welfare assistance.

On 4 August 1994 the International Association for the Protection of Human Rights in Cyprus (hereinafter "Human Rights Association") asked the Ministry of Defence to exempt the applicant from military service, given that the National Guard did not accept in its ranks persons who declared themselves to be homosexuals. The Human Rights Association further requested the Ministry not to use the applicant's homosexuality as a ground for declaring him psychiatrically unsuitable for military service, as this would violate the Constitution and the country's international obligations. The Human Rights Association urged the Ministry to put an end to the uncertainty about a very serious matter concerning the applicant's private life.

On 4 November 1994 the applicant was informed by the District Welfare Office of Nicosia that he was not entitled to welfare assistance because he had voluntarily made himself unemployed. On 6 November 1994 the applicant complained to the Ombudsman. He claimed, inter alia, that he had been refused employment as an architect at the Ministry of Defence because of his outstanding military service obligations and, as a result, he was not prepared to accept a lower paid job which would not be suitable for a person with his qualifications.

On 21 November 1994 the Ministry of Defence informed the Human Rights Association that the law made no provision exempting homosexuals from the obligation to do military service. As a result, the army authorities would have to submit the applicant to the usual tests to determine whether he was physically capable for military service. The

Ministry further informed the Association that on 22 September 1994 criminal proceedings had been instituted against the applicant for draft evasion.

On 2 December 1994 the Human Rights Association asked the Ministry of Defence to clarify whether the committee which would examine whether the applicant was suitable for military service would also examine whether he was homosexual. If so, the Human Rights Association wanted to know whether the applicant would be recruited, despite his being a homosexual.

On 6 December 1994 the applicant lodged a complaint with the Ombudsman concerning his treatment by the Ministry of Defence.

On 9 December 1994 the applicant applied again to the District Welfare Office of Nicosia for welfare assistance. On 22 December 1994 the Ombudsman rejected the applicant's complaint concerning the initial refusal of the District Welfare Office of Nicosia to grant him welfare assistance.

On 2 January 1995 the Office of the Military Prosecutor assured the applicant that no proceedings had been instituted against him.

On 8 February 1995 the Ministry of Defence replied to the Human Rights Association that, although homosexuality is not considered a disease, the competent committee examined the presence of personality disorders.

On 21 February 1995 the applicant appeared on a television broadcast concerning homosexuality.

On 24 February 1995 the Human Rights Association invited the Ministry of Defence to clarify whether homosexuality was considered to be a personality disorder and whether the National Guard would admit a homosexual in its ranks.

On 27 February 1995 two Cyprus newspapers published a letter by the "Group of Outraged Normal Citizens" concerning the television broadcast of 21 February 1995. Although the applicant was not specifically named in the letter, he considered that it was directed against him, since it referred to a person who appeared on the television broadcast of 21 February 1995 and whose life story corresponded to that of the applicant. The applicant further considered that some of the terms used in the letter, such as "unnatural sex" and "unnatural sexual urges", insulted him and on 8 March 1995 he asked the Attorney General to institute proceedings against its authors for libel.

On 8 March 1995 the Ombudsman rejected the applicant's complaint regarding his treatment by the Ministry of Defence.

On 20 March 1995 the Ministry of Defence informed the Human Rights Association that homosexuality was not considered to constitute a personality disorder and that the applicant would have to submit himself to the same examination as every other prospective conscript.

On 22 March 1995 the Attorney General informed the applicant that he was unwilling to institute proceedings against the authors of the letter of 27 February 1995. He further indicated that, if the applicant wished to institute civil proceedings, he remained free to consult a lawyer of his own choice. On 31 March 1995 the applicant once again wrote to the Attorney General asking him to institute proceedings against the authors of the letter, since the applicant lacked the necessary means for instituting proceedings himself and there was no legal aid system in Cyprus.

On 10 April 1995 the applicant was referred by the District

Unemployment Office of Nicosia for an interview to the Department of Research and Statistics (Tmima Statistikis ke Erevnon) which was looking for temporary personnel. The examiner gave the applicant an overall mark of 37/50, having marked him 7/10 for his personality and general appearance. The examiner noted that "it was in poor taste that (the applicant) wore an earring. I would have rejected him for that reason alone. In addition, our man is a bit of an artistic type." The applicant was not hired. Successful candidates obtained better overall marks than the applicant.

On 3 May 1995 the applicant lodged a complaint with the Ombudsman concerning the failure of the Department of Research and Statistics to employ him.

In June 1995 the applicant received another call-up paper.

On 20 June 1995 the applicant applied for welfare assistance for the third time.

On 3 July 1995 the Office of the Military Prosecutor once again assured the applicant that no proceedings had been instituted against him. On 14 July 1995 the Ministry of Defence informed the applicant that he could not leave the country because he had not submitted himself to the draft.

On 26 July 1995 the Ombudsman rejected the applicant's complaint concerning the Department of Research and Statistics. The Ombudsman considered that the examiner's note was rather unfortunate and, in other circumstances, it could have constituted an unjustified insult to the applicant's personality. However, his candidature had been examined by a collective organ, which had the right to take account of his appearance, since the temporary personnel to be recruited would come into contact with all strata of Cypriot society.

On 1 August 1995 the Office of the Military Prosecutor assured the applicant once again that no proceedings had been instituted against him.

On 30 August 1995 the Human Rights Association asked the Ministry of Defence to explain why no criminal proceedings had been instituted against the applicant for draft evasion and why the Ministry had failed to provide a clear reply as to whether homosexuals were admitted to the National Guard. The Association further raised the issue of the applicant being denied permission to travel abroad.

On 5 September 1995 the Ministry of Defence informed the applicant that, further to a letter the Attorney General had addressed to them on 4 September 1995, they had decided to give the applicant permission to travel abroad.

On 14 September 1995 the District Welfare Office of Nicosia considered that the applicant's income did not render him eligible for welfare assistance.

On 16 September 1995 the applicant applied to the Attorney General for legal aid in order to sue the Republic for damages for the treatment to which he had been subjected by the authorities. On 22 September 1995 his application was rejected.

On 22 September 1995 the applicant was acquitted of criminal charges brought against him for having failed to pay certain social security contributions as a self-employed person in 1993. The applicant had been represented by legal aid counsel in the proceedings.

On 21 November 1995 the applicant lodged a complaint with the Ombudsman concerning the decision of 14 September 1995 of the District Welfare Office of Nicosia.

On 30 November 1995 the applicant received a new call-up paper.

On 19 January 1996 the Ombudsman considered that the applicant was not entitled to welfare assistance, because his income exceeded by 16 Cyprus pounds the basic subsistence allowance.

Relevant domestic law and practice

a. Sections 171, 172 and 173 of the Criminal Code of Cyprus provide as follows:

> "171. Any person who -
>
> (a) has carnal knowledge of any person against the order of nature; or
> (b) permits a male person to have carnal knowledge of him against the order of nature, is guilty of a felony and is liable to imprisonment for five years.
>
> 172. Any person who with violence commits either of the offences specified in the last preceding Section is guilty of a felony and liable to imprisonment for fourteen years.
>
> 173. Any person who attempts to commit either of the offences specified in Section 171 is guilty of a felony and is liable to imprisonment for three years, and if the attempt is accompanied with violence he is liable to imprisonment for seven years."

In its Modinos v. Cyprus judgment of 22 April 1993 (Eur. Court HR, Series A no. 259) the European Court of Human Rights found that the prohibition of male homosexual conduct in private between adults continuously and directly affected the private life of the applicant in that case, who was a homosexual, and gave rise to a violation of Article 8 of the Convention.

b. On 2 June 1995 a Cypriot newspaper carried an article on army practices concerning homosexuals. It was reported that, in the course of the examinations to which all prospective conscripts were subjected, homosexuals were picked out and were exempted from military service on the ground that they had "psychological problems".

The applicant has submitted a certificate of temporary exemption from military service issued on 19 July 1984 to Mr. S. The certificate indicates that Mr. S is unsuitable (akatallilos) for military service because he suffers from a sexual perversion, being a passive homosexual.

COMPLAINTS

1. The applicant complains under Article 8 of the Convention about the prohibition of male homosexual conduct in private between adults in Cyprus.

2. The applicant also complains under Articles 3, 8, 14 and 17 of the Convention about the manner in which he has been generally treated by the Cypriot authorities, which he attributes to the fact that he is a homosexual.

3. The applicant further complains of a violation of Article 3 para. 2 of Protocol No. 4 in that, while he was in Greece, the Cypriot consular authorities had refused him a passport and, as a result, he could not return to Cyprus.

4. Moreover, the applicant complains under Article 2 para. 2 of

Protocol No. 4 that, during a certain period after his return to Cyprus, he was not allowed to leave the country.

5. Finally, the applicant complains under Articles 6 para. 1 and 13 of the Convention of his inability to institute court proceedings, not having the necessary means and there being no legal aid in Cyprus.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 11 March 1996 and registered on 22 April 1996.

On 14 October 1996 the Commission decided to communicate the complaint concerning the prohibition of male homosexual conduct in private between adults to the respondent Government.

The Government's written observations were submitted on 19 December 1996. The applicant replied on 17 February 1997.

THE LAW

1. The applicant complains under Article 8 (Art. 8) of the Convention of the prohibition of male homosexual conduct in private between adults in Cyprus.

Article 8 (Art. 8) of the Convention provides as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The respondent Government refer to the Modinos v. Cyprus judgment of 22 April 1993 (Eur. Court HR, Series A no. 259) and accept that the continued existence on the statute book of the prohibition of homosexual conduct in private between adults gives rise to an interference with the applicant's right to respect for his private life under Article 8 para. 1 (Art. 8-1) of the Convention, notwithstanding the fact that the applicant has never been charged and prosecuted under the relevant provisions of the Criminal Code. A bill designed to ensure compliance with the above-mentioned Modinos judgment has been brought to the House of Representatives, but its adoption has been delayed because of the general election in 1995.

The applicant points out that the bill has not yet been adopted.

In the light of the parties' observations, the Commission considers that this part of the application raises serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. It cannot, therefore, be regarded as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention, and no other ground for declaring it inadmissible has been established.

2. The applicant complains under Articles 3, 8, 14 and 17 (Art. 3, 8, 14, 17) of the Convention about the manner in which he has been generally treated by the Cypriot authorities, which he attributes to the fact that he is a homosexual.

The Commission notes that the applicant claims that, although he is indigent, the Attorney General refused to grant him legal aid in

order to sue the Republic for damages for the treatment to which he had been subjected by the authorities. However, the Commission does not consider it necessary to decide whether the applicant can be dispensed from the obligation to exhaust domestic remedies under Article 26 (Art. 26) of the Convention. Even assuming that he can, this part of the application must be declared inadmissible as manifestly ill-founded.

Thus, the Commission considers that the applicant has not been subjected to treatment which has attained the minimum level of severity required before a breach of Article 3 (Art. 3) of the Convention can be established (Eur. Court HR, Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 162). Therefore, no appearance of a violation of that provision is disclosed.

As regards Article 8 (Art. 8) of the Convention, the Commission notes that the applicant complains that homosexuals are excluded from the army after they have been certified as "physically incapable" by the Conscription Board and that he was refused a job with the Department of Research and Statistics because of his appearance. However, the Commission recalls that the Convention does not guarantee the right to serve in the armed forces or to be recruited in public sector employment. In any event, even assuming that the authorities' conduct could give rise to an issue under Article 8 para. 1 (Art. 8-1) of the Convention, in the particular circumstances of the case there could be no interference with the right to respect for private life. The Commission notes in this connection that the applicant has never appeared before the Conscription Board. Moreover, it has not been established that, if the applicant's appearance had not been taken into consideration, he would have been offered a temporary contract with the Department of Research and Statistics. As a result, no appearance of a violation of Article 8 (Art. 8) of the Convention is disclosed.

Moreover, the Commission considers that it has not been established that the applicant has been discriminated against because of his sexual preferences in the enjoyment of any rights guaranteed under the Convention, nor have the authorities relied on a provision in the Convention to destroy any of the rights contained therein or limit them to a greater extent than provided for in the Convention. As a result, no appearance of a violation of Articles 14 and 17 (Art. 14, 17) of the Convention is disclosed either.

It follows that this part of the application must be rejected as manifestly ill-founded under Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant complains of a violation of Article 3 para. 2 of Protocol No. 4 (P4-3-2), which guarantees the right to enter the territory of the State of which one is a national, in that, while he was in Greece, the Cypriot consular authorities had refused him a passport.

The Commission is prepared to assume that the applicant has complied with the requirements of Article 26 (Art. 26) of the Convention, but, in any event, the applicant has not substantiated his allegation that, because of the refusal of the Cypriot consular authorities in Greece to issue him with a passport, he could not return to his country of origin. It follows that this part of the application must be rejected as manifestly ill-founded under Article 27 para. 2 (Art. 27-2) of the Convention.

4. The applicant complains under Article 2 para. 2 of Protocol No. 4 (P4-2-2) that, during a certain period after his return to Cyprus, he was not allowed to leave the country.

The Commission is again prepared to assume that the applicant has complied with the requirements of Article 26 (Art. 26) of the

Convention. The Commission recalls that Article 2 para. 2 of Protocol No. 4 (P4-2-2), which guarantees the right to leave any country, including one's own, must be read subject to the third paragraph of Article 2 of Protocol No. 4 (P4-2) which provides as follows:

> "No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Commission notes that the applicant was not allowed to leave Cyprus because he had not complied with his military service obligations. The applicant has not submitted that this was not "in accordance with law". Moreover, the Commission considers that it could be considered necessary in a democratic society for the maintenance of ordre public as envisaged in Article 2 para. 3 of Protocol No. 4 (P4-2-3). It follows that no appearance of a violation of Article 2 para. 2 of Protocol No. 4 (P4-2-2) is disclosed. As a result, this part of the application must be rejected as manifestly ill-founded under Article 27 para. 2 (Art. 27-2) of the Convention.

5. The applicant complains under Articles 6 para. 1 and 13 (Art. 6-1, 13) of the Convention of his inability to sue the Republic for damages in respect of the manner in which he had been treated by the authorities. He submits in this connection that he does not have the necessary means and that there is no legal aid in Cyprus.

However, the Commission recalls that Article 6 para. 1 (Art. 6-1) of the Convention does not always guarantee legal aid in civil cases. Even where legal aid may be available for certain types of civil action, it is reasonable to impose conditions on its availability involving, inter alia, the financial situation of the litigant or the prospects of success of the proceedings (No. 8158/78, Dec. 10.7.80, D.R. 21 p. 95; No. 10871/84, Dec. 10.7.86, D.R. 48 p. 154; No. 10594/83, Dec. 14.7.87, D.R. 52 p. 158). Since the applicant has not shown that the intended action would have had any prospects of success, no appearance of a violation of Article 6 para. 1 (Art. 6-1) is disclosed.

Moreover, the Commission recalls that the right to an effective remedy under Article 13 (Art. 13) can only be claimed by someone who has an arguable claim to be a victim of a violation of a right recognised by the Convention (No. 10427/83, Dec. 12.5.86, D.R. 47 p. 85). However, the applicant has no arguable claim to be a victim of a violation of Articles 3, 8, 14 and 17 (Art. 3, 8, 14, 17) of the Convention because of the manner in which he had been treated by the authorities. It follows that no appearance of a violation of Article 13 (Art. 13) is disclosed either.

As a result, this part of the application must be rejected as manifestly ill-founded under Article 27 para. 2 (Art. 27-2) of the Convention.

7. The applicant finally complains under Articles 6 para. 1 and 13 (Art. 6-1, 13) of the Convention about his inability to institute proceedings for libel against the authors of the letter which appeared in the Cypriot press on 27 February 1995.

The Commission notes that, although the Attorney General refused to institute proceedings in this connection on 22 March 1995, the applicant did not complain to the Commission before 11 March 1996. It follows that this complaint has not been lodged within the six-month period provided for under Article 26 (Art. 26) of the Convention. This part of the application must be, therefore, rejected in accordance with Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES ADMISSIBLE THE COMPLAINT CONCERNING THE CONTINUED CRIMINAL PROHIBITION OF HOMOSEXUAL ACTS BETWEEN ADULTS IN PRIVATE, without prejudging the merits of the case;

DECLARES THE REMAINDER OF THE APPLICATION INADMISSIBLE.

H.C. KRÜGER	S. TRECHSEL
Secretary	President
to the Commission	of the Commission